Nos. 83-1840 and 83-1841

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN M. BERTHELOT, PETITIONER

v.

UNITED STATES OF AMERICA

FRANCIS V. CHERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether fire officials properly seized drug-manufacturing equipment that they observed in petitioner Berthelot's house after they had extinguished a fire there but while they were still on the premises to check for "hot spots" and to determine the cause of the fire.

2. Whether the evidence was sufficient to support petitioners' convictions.

3. Whether the district court relied on misinformation in sentencing petitioner Berthelot.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5)[1] is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1984. A petition for rehearing was denied on March 12, 1984. The petitions for a writ of certiorari were

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[1]"Pet. App." refers to the Appendix to the Petition in No. 83-1841.

filed on May 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners each were convicted of conspiring to manufacture methamphetamine, in violation of 21 U.S.C. 846, and sentenced to five years' imprisonment. The court of appeals affirmed in a memorandum opinion (Pet. App. A1-A5).

The evidence showed that in July 1981, petitioner Berthelot purchased a residence on Annin Creek Road in McKean County, Pennsylvania (Tr. 560-567, 580). Following the purchase, he covered all the windows on the lower level of the house with boards and installed a fan in the kitchen window (Tr. 582-583). Over the next five months, Berthelot's vehicle was observed in front of the residence on a daily basis, and from time to time Berthelot was seen working outside the house (Tr. 488-499). During that same period, petitioner Cherry also was observed outside the house (Tr. 488-489).

On November 30, 1981, petitioner Berthelot, waving a hammer, ran off the porch of the house in front of a moving vehicle, forcing it to stop. He jumped into the vehicle and put his foot on the gas pedal, all the time screaming at the driver, Norman Henton, that somebody was shooting at his house. As the vehicle proceeded on its way, Berthelot took a rifle from the seat of the car and threatened to shoot a woman who was driving behind Henton and Berthelot, but Henton dissuaded him from doing so. Each time a car passed, Berthelot ducked down for fear he would be shot. Tr. 483-488. When the car reached a local diner, Berthelot had the diner's owner call the police (Tr. 485).

When Trooper William Hill of the Pennsylvania State Police arrived at the diner, he noticed that petitioner Berthelot was acting confused and that his hand was bleeding. Berthelot told Hill that he had been in a hunting accident. Tr. 326-330. Hill called in Game Protector James Rankin, who was charged with investigating hunting accidents, and the two men asked Berthelot what had happened, but Berthelot stated that he did not know (Tr. 331-332).

Officer Hill, Game Protector Rankin, and petitioner Berthelot later went to Berthelot's residence. As they approached the front porch, petitioner Cherry came out of the house. Hill noticed that some of the upstairs windows were broken and that there were bloodstains on the curtains, which were blowing in the wind. Upon being questioned by Hill, Cherry stated that he did not think there had been a hunting accident. Berthelot then changed his story and stated that he had had a fight with somebody named Tom, who had since departed in his own vehicle. Hill placed Berthelot under arrest for giving a false report. Tr. 337-339.

After petitioners denied Officer Hill permission to look around the house, Hill stated that he was going to obtain a search warrant. Hill then left with petitioner Berthelot to place a call to his station house, and petitioner Cherry reentered the house (Tr. 341). A few minutes later, Game Protector Rankin heard a noise coming from the house that sounded like furniture being dragged across the floor (Tr. 414).

When Officer Hill returned from making his call, he once again, in the presence of both petitioners, stated that he was going to obtain a search warrant for the house (Tr. 403). After Hill left, petitioner Cherry reentered the house. A few minutes later, Game Protector Rankin noticed smoke and then flames arising from the house (Tr. 412). Thereafter, Cherry came out of the house carrying a hunting rifle and

informed Rankin that the house was on fire. Cherry did not appear to be upset but merely walked up the road a bit and then stopped. Tr. 415-417.

The local fire department responded to the alarm and extinguished the fire. While checking for "hot spots" and conducting a preliminary investigation into the cause of the fire, Fire Chief Lawrence Brundage observed partially or totally damaged flasks, distilling tubes, transformers, gas masks, and heating units among the debris (Tr. 7-8), as well as a bottle of 190 proof grain alcohol (Tr. 520). Brundage seized these items and turned them over to the fire marshal (Tr. 9, 33-34).

Subsequently, law enforcement officers, acting pursuant to search warrants, seized additional laboratory equipment from the house (Tr. 672-675; C.A. App. 117, 124). The equipment seized was of the type used in the manufacture of methamphetamine (Tr. 697-706) and, indeed, traces of that drug were detected in several flasks and condenser tubes (Tr. 646-647).

ARGUMENT

1. Petitioners contend (83-1840 Pet. 25-34; 83-1841 Pet. 10-14) that Fire Chief Brundage violated their Fourth Amendment rights when he seized the laboratory equipment in the aftermath of the fire. They do not dispute that, once the fire was extinguished, the fire officers were entitled to remain on the premises to check for "hot spots" and to conduct an investigation into the cause of the fire. See *Michigan* v. *Clifford,* No. 82-357 (Jan. 11, 1984), slip op. 5 (plurality opinion); *Michigan* v. *Tyler,* 436 U.S. 499, 509-510 (1978). Nor do petitioners appear to dispute that fire officers may seize evidence of the cause of a fire or of independent criminal activity lawfully observed while on the premises. *Ibid.* Rather, petitioners argue that the seizure of the laboratory equipment was unlawful because Fire

Chief Brundage had no reason to believe that the seized items were connected to the cause of the fire or to any illegal activity.

In our submission, Fire Chief Brundage had ample cause to believe that the laboratory equipment might be relevant in determining the cause of the fire. As a result of his initial investigation, Brundage was unable to determine the cause or origin of the fire. Although he was unaware of the events leading up to the fire, he had been told by other officials that the fire was suspicious. Tr. 21. In short, Brundage could not rule out the possibility of either accident or arson. Given the nature of the items seized — beakers, distilling tubes, heaters, gas masks, 190 proof grain alcohol — it was not unreasonable for Brundage to conclude that the occupants of the house were engaged in some sort of activity — he thought they might be distilling liquor (Tr. 544) — which either caused the fire or provided a motive for the occupants or someone else to set the fire.[2] Accordingly, Brundage acted properly to preserve items that could help illuminate the cause of the fire by removing them from the rubble.[3] See

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[2]Petitioner Berthelot appears to suggest (83-1840 Pet. 30-31) that Brundage had no right to search the dining room, where the laboratory items were observed in plain view, after he determined that the fire had started in another part of the house. To be sure, in *Michigan* v. *Clifford*, slip op. 10, the plurality indicated that once investigators have determined the cause of a fire and located its place of origin, a search of other portions of the premises may be conducted only pursuant to a warrant. But here Brundage had not determined the cause of the fire when he observed the laboratory equipment in the dining room. The fact that the fire started in one part of the house certainly does not mean that evidence of its cause would not be found elsewhere on the premises. Moreover, Brundage had entered the dining room at least in part for the purpose of putting out "hot spots." It cannot seriously be contended that this was improper. See *id.* at 6 n.4.

[3]Indeed, we question whether petitioners could have had a reasonable expectation of privacy in the remains of the premises after the fire. As this Court noted in *Michigan* v. *Clifford*, slip op. 5 (plurality opinion), "[s]ome fires may be so devastating that no reasonable privacy interests

Michigan v. *Tyler*, 436 U.S. at 510 ("[i]mmediate investigation may also be necessary to preserve evidence from intentional or accidental destruction"). His ignorance of the precise purpose to which the laboratory equipment had been put did not render his action any less reasonable under the circumstances.[4]

2. Arguing that the government's proof established at most their presence at a house where methamphetamine was manufactured and petitioner Berthelot's part ownership of the house, petitioners challenge the sufficiency of the evidence supporting their conspiracy convictions (83-1840 Pet. 45-57; 83-1841 Pet. 14-19). Contrary to petitioners' assertions, however, the evidence established significantly more than their mere ownership of or presence on the premises in question.

The evidence against petitioner Berthelot showed that in July 1981 he purchased the house on Annin Creek Road in his mother's name (Tr. 560-567, 579-580, 584) and that he had an ownership interest in the house (Tr. 362); that after

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remain in the ash and ruins, regardless of the owner's subjective expectations." Here, the evidence showed that the fire reduced the premises to rubble (Tr. 671-672), a fact that petitioners themselves acknowledge (83-1840 Pet. 12; 83-1841 Pet. 6).

[4]Brundage's seizure of the laboratory equipment may also be sustained under the inevitable discovery doctrine. See *Nix* v. *Williams*, No. 82-1651 (June 11, 1984). Petitioners do not contend that Brundage would have violated their Fourth Amendment rights had he merely made a list of the items he observed. And while the significance of those items was not immediately apparent to Brundage, the state police officers with whom Brundage was in immediate contact would have known from Brundage's description of the items that they were of the type normally used in an illegal drug operation (Tr. 87-88). Thus, the officers could have applied for and obtained a search warrant based on Brundage's reported observations. In circumstances in which the search that leads to discovery of evidence was lawful, the premature seizure should not provide a basis for suppressing what would in any event ultimately have been seized.

purchasing the house he boarded over all the windows on the lower floor and installed a hooded fan over one of the kitchen windows (Tr. 582-583); that the chemicals used in manufacturing methamphetamine produce strong odors and that one way of dealing with the odors is to blow them out of doors by means of a fan (Tr. 708); that vehicles belonging to Berthelot were observed parked in front of the house on a continuous basis from July through November, 1981 (Tr. 489-490); and that on several occasions during that period Berthelot was observed working outside the house (Tr. 488). This evidence — together with the proof that the laboratory equipment was found in plain view in the kitchen and dining room of the house — was sufficient to implicate Berthelot in a scheme to manufacture methamphetamine.[5]

The evidence against petitioner Cherry likewise was sufficient to implicate him in the scheme. It showed that Cherry had been observed at the house prior to November 30, 1981 (Tr. 488-499); that he was present when Officer Hill stated that he was going to obtain a search warrant for the house (Tr. 340-341); that soon thereafter he was heard dragging something across the floor of the house (Tr. 447); that he was alone in the house when, moments later, the fire started (Tr. 412-413); that when he emerged from the house he was very calm and just stood in the road instead of seeking help (Tr. 454); and that, in the opinion of the fire marshal, the fire had been set (Tr. 756-757). From this evidence, the jury was entitled to conclude that Cherry had set the fire in order to destroy the evidence of methamphetamine manufacturing and therefore that he was a participant in the manufacturing scheme. See *United States* v.

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[5]In addition, Berthelot's strange behavior on the day of his arrest strongly suggests that he had ingested a narcotic; neither Officer Hill, Game Protector Rankin, nor the driver of the vehicle that Berthelot commandeered noticed the odor of alcohol on his breath (Tr. 356, 397, 491).

Mastropieri, 685 F.2d 776, 790-791 (2d Cir.), cert. denied, 459 U.S. 945 (1982); *United States* v. *Castillo*, 615 F.2d 878, 885 (9th Cir. 1980); *United States* v. *Freeman*, 498 F.2d 569, 576 (2d Cir. 1974).

In short, the court of appeals correctly determined that petitioners' challenge to the sufficiency of the evidence lacked merit (Pet. App. A3), and that fact-bound determination does not warrant this Court's review.[6]

3. Petitioner Berthelot's presentence report contained the opinion of the DEA agent who investigated this case that, based on the nature of the equipment found, the methamphetamine laboratory operated by petitioners was capable of producing 136,000 to 400,000 dosage units of methamphetamine every five hours and three to six pounds a week. Arguing that there was no factual basis for this opinion nor any reliable means for determining the capability of the drug laboratory, petitioner Berthelot contends (83-1840 Pet. 35-44) that his right to due process was violated insofar as the district court relied on the agent's opinion in imposing sentence.

In support of his claim, Berthelot cites cases suggesting that a defendant is entitled to relief when there is a significant possibility that the sentencing decision rested on

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[6]In passing, petitioners suggest (83-1840 Pet. 47-48; 83-1841 Pet. 15) that their acquittal on the substantive charge of manufacturing a controlled substance indicates that the evidence was insufficient to support their conspiracy convictions. But there is nothing necessarily inconsistent in convicting a defendant on a conspiracy count while acquitting him on the underlying substantive offense. Here, for example, the jury could have found that although petitioners had entered into an agreement to manufacture methamphetamine, they never actually manufactured the drug or that they did so in a de minimis amount not warranting conviction. In any event, few principles of criminal law are as well established as the rule of *Dunn* v. *United States*, 284 U.S. 390, 393, 394 (1932), that "[c]onsistency in the verdict is not necessary * * *. [V]erdicts cannot be upset by speculation or inquiry into [the reasons for the inconsistency]." See also *Harris* v. *Rivera*, 454 U.S. 339, 345 (1981); *Hamling* v. *United States*, 418 U.S. 87, 101 (1974).

misinformation. See *United States* v. *Robin*, 545 F.2d 775, 779 (2d Cir. 1976); *United States* v. *Bass*, 535 F.2d 110, 118 (D.C. Cir. 1976); *McGee* v. *United States*, 462 F.2d 243, 247 (2d Cir. 1972). Here, the trial judge expressly noted at sentencing that the information concerning the capability of the laboratory was merely an opinion of the DEA agent and that the judge could not remember whether any evidence on the point had been introduced at trial. The trial judge added that while the issue might be worth raising with the parole board or in a legal proceeding relative to the issue of parole, it was not "per[tinent] to the sentence of th[e] court which is a matter of discretion * * *" (C.A. App. 318-319). Even assuming that the agent's opinion was erroneous, it is clear from the judge's statements that that opinion was not a factor in the sentence, and the court of appeals' finding to that effect (Pet. App. A4) does not warrant this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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